enhance the applicant's equitable interest acquired subsequent to the respondent's caveat so as to equal, let alone override, the respondent's priority of interest established by the caveat. Although it is clear on the authorities (*Crosbie-Hill* v *Sayer*,[4] *Abigail* v *Lapin*[5] and *Zeno Ltd* v *Prefabricated Construction Co (Malaya) Ltd & Anor*[6] to name a few) that one's prior equity can be defeated or postponed by some act or omission on one's part, I fail to see how the facts in this case can be considered to have rendered it inequitable for the respondent to insist on its priority against the applicant especially when the applicant purchased the said property subject expressly to the caveat.

This motion is accordingly dismissed with costs.

Motion dismissed.

Solicitors: *TK Lim & Co; Shariff & Som.*

Reported by *Yap Shao Sin*

Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CODE NO D4-25-60-1989
ZAKARIA YATIM J
10 APRIL 1990

Civil Procedure — Arbitration — Application for order to decide locus standi of party to arbitration — Jurisdiction to make order — Arbitration Act 1952, s 34

Arbitration — Regional Centre for Arbitration — Supervisory function of court — Whether exercisable — Arbitration Act 1952, s 34

The applicant and first respondent are parties to a contract dated 25 May 1985 relating to the installation of a pulp and paper mill in Sipitang, Sabah, Malaysia. A dispute arose between the parties and according to cl 37 of the contract the dispute has to be settled by arbitration in accordance with the Rules for Arbitration of the Regional Centre for Arbitration in Kuala Lumpur (hereinafter referred to as 'the Arbitration Centre'). Pursuant to the said clause, the parties submitted their dispute to the Arbitration Centre for arbitration. The arbitrators were duly appointed and the parties filed their pleadings. During the adjournment of the arbitration proceedings, the applicant filed an application for an order of the court, inter alia, that the applicant be at liberty to continue the counterclaim against the first respondent, pending in the Arbitration Centre, which proceedings were commenced by the second respondent, as receivers and managers of the first respondent, notwithstanding the order to wind up the first respondent.

Held, dismissing the application:

(1) It is clear that under s 37, the court cannot exercise its supervisory function as provided in the Arbitration Act 1952, in respect of such arbitration. Neither can the court exercise its supervisory function over such arbitration under any written law. The words 'written law' include the Companies Act 1965.

(2) Therefore, the question of capacity or locus standi of a party to the arbitration, the question of security for costs, or the issue of pleadings before the arbitral tribunal, cannot be determined by the court by virtue of s 34. These are issues which the arbitral tribunal has to decide and the court cannot and will not interfere with the proceedings of the tribunal.

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 02-196-90.]

Case referred to
1 *Goldsack* v *Shore* [1950] 1 KB 708 (refd)

Legislation referred to
Arbitration Act 1952 s 34

Cecil Abraham (*Julian Ding* with him) for the applicant.
D Puthucheary (*Chia Loong Thye* with him) for the second respondent.

Cur Adv Vult

Zakaria Yatim J: This is an application by the applicant for an order of the court:

(1) that the applicant be at liberty to continue the counterclaim against the abovenamed first respondent, now pending in the Regional Centre for Arbitration, Kuala Lumpur, before an arbitral tribunal, chaired by Mr Francis McWilliams, which arbitration proceedings were commenced by the abovenamed second respondent, as receivers and managers of the first respondent, pursuant to s 226(3) of the Companies Act 1965, notwithstanding the order to wind up the said first respondent dated 15 August 1989;

(2) that the abovenamed second respondent do provide security for the costs of the arbitration proceedings on a complete indemnity basis, in the sum of $400,000 pursuant to s 351 of the Companies Act 1965;

(3) that it be determined whether on the proper construction of the debenture exhibited in the supplementary affidavit, the second respondent has the power to continue with the arbitration commenced at the Regional Centre for Arbitration.

The applicant and the first respondent are parties to a contract dated 25 May 1985 relating to the installation of a pulp and paper mill in Sipitang, Sabah, Malaysia. A dispute arose between the parties, and according to cl 37 of the contract the dispute has to be settled by arbitration in accordance with the Rules for Arbitration of the Regional Centre for Arbitration in Kuala Lumpur (hereinafter referred to as 'the Arbitration Centre'). Clause 37 states as follows:

Settlement of Disputes

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules for Arbitration of the Kuala Lumpur Regional Arbitration Centre.

The appointing authority shall be the Kuala Lumpur Regional Arbitration Centre.

The number of arbitrators shall be three according art 7 of the Rules.

The place of arbitration shall be Kuala Lumpur. The language to be used in the arbitral proceedings shall be English.

The arbitrators are bound to observe the terms of the contract. The law applicable to this contract shall be that of Switzerland.

Pursuant to the above clause, the parties submitted their dispute to the Arbitration Centre for arbitration. The arbitrators were duly appointed and the parties filed their pleadings. On 15 September 1989, the arbitrators made an award on a preliminary point, namely, on security for costs. The award made was based on the consensus of the parties.

During the adjournment of the arbitration proceedings, the applicant filed the present application on a certificate of urgency.

The question for the court to consider is whether it has the power to make an order as prayed for in the application?

The arbitration centre is an independent international institution. See my paper in Seminar on International Commercial Arbitration, Kuala Lumpur 2-3 November 1982 p 9 and my article, 'Settlement of Commercial Disputes, Malaysia' [1983] 1 MLJ cxviii at cxxiv. It was established in Kuala Lumpur pursuant to an agreement between the government of Malaysia and the Asian African Legal Consultative Committee (AALCC) through an exchange of letters in March 1978. It was a term of the agreement that the Arbitration Centre would function as an independent institution under the auspices of the AALCC. See my article, 'The Regional Centre for Arbitration, Kuala Lumpur' [1978] 2 MLJ lxxx at lxxxi.)

As an international arbitral institution, the Arbitration Centre has its own rules for arbitration. According to the rules, disputes shall be settled in accordance with the arbitration rules made by the United Nations Commission On International Trade Law (hereinafter referred to as 'UNCITRAL Arbitration Rules') as modified by the Rules of the Arbitration Centre. See 'Arbitration Under the Auspices of the Kuala Lumpur Centre'.

Having stated the status of the Arbitration Centre as an independent international arbitral institution, I shall now consider whether the court has jurisdiction to exercise supervisory function over arbitration proceedings held under the Rules of the Centre. Section 34 of the Arbitration Act 1952 provides:

> (1) Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.
>
> (2) Where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection (1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provisions of the Convention specified in subsection (1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, as may be appropriate.
>
> (3) The competent court for the purpose of such enforcement shall be the High Court.

Mr Cecil Abraham, counsel for the applicant, submitted that the first respondent was under receivership in January 1988 and on 14 August 1989 it was compulsively wound up under s 218 of the Companies Act 1965. He referred to the debentures under which the receivers and managers were appointed. He then asked the court to consider under what authority and power the receivers and managers continued with the arbitration. According to him, the right to proceed with arbitration depended solely on the construction of the debentures and s 34 did not apply. He submitted that the words 'other written law' could not be given a wide interpretation. According to him, the section only precludes the application of the Arbitration Act 1952, but does not extend to question of capacity or competence of the receivers and managers to continue with the arbitration. He therefore contended that the question of capacity has to be determined by the court.

Datuk Dominic Puthucheary, counsel for the respondents, on the other hand submitted that s 34 clearly ousted the supervisory role of the court under all laws in force in Malaysia. He said that the words in s 34 are 'plain, clear and precise'. He contended that since the Arbitration Centre served the Asian and the Pacific Region it was only logical that the Arbitration Centre be excluded from any supervisory function of the municipal courts in Malaysia. It would be impossible, he said, for the Arbitration Centre to function as an international arbitral institution if Malaysian laws were applicable in a supervisory capacity or in any other way. Datuk Dominic Puthucheary then submitted that the question of locus standi raised by Mr Abraham should be determined by the arbitrators.

In my opinion the crucial words in s 34 are '... the provisions of this Act and other written law shall not apply to any arbitration held under ... the Rules of the Regional Centre for Arbitration at Kuala Lumpur'. It is clear that under the section, the court cannot exercise its supervisory function as provided in the Arbitration Act 1952, in respect of such arbitration. Neither can the court exercise its supervisory function over such arbitration under any other written law. The words 'written law' has been defined in s 3 of the Interpretation Act 1967, to mean the Federal Constitution and State Constitutions, Acts of Parliament and subsidiary legislation made thereunder; ordinances and enactments and subsidiary legislation made thereunder; and any other legislative enactments or legislative instruments. 'Written Law', therefore, includes the Companies Act 1965.

It has been said that the jurisdiction of the courts must not be taken to be excluded unless there is quite clear language in the Act to have that effect. See dictum of Eversheed MR in *Goldsack* v *Shore*[1] at p 712. In the present case, I agree with Datuk Dominic Puthucheary that the words in s 34 are 'plain, clear and precise'. Reading the clear language of the section I am of the view that the section excludes the court from exercising its supervisory function under the Arbitration Act 1952 or under any other written law, including the Companies Act 1965, in respect of arbitrations held under the Rules of the Arbitration Centre.

Therefore, the question of capacity or locus standi of a party to the arbitration, the question of security for costs, or the issue of pleadings before the arbitral tribunal, cannot be determined by the court by virtue of s 34. These are issues which the arbitral tribunal has to decide and the court cannot and will not interfere with the proceeding of the tribunal. The function of the court is confined only to the enforcement of the arbitral award if the award is sought to be enforced in Malaysia.

Mr Cecil Abraham, in the course of his submission seemed to suggest that under art 26(3) of the UNCITRAL Arbitration Rules, the applicant was entitled to seek the relief sought in the application. Article 26(3) reads:

> A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

It will be noted that art 26 is under the heading of 'Interim Measures of Protection'. What para 3 of art 26 means is that a party to an arbitral proceeding, may if he so desires, apply to an appropriate judicial authority, to take interim protective measures in order to protect the subject matter of the dispute. See *United Nations Commission on International Trade Law, Yearbook* Vol VII, 1976, p 176. But, with respect, the present application is not an application to take interim protective measures within the meaning of art 26(2).

Mr Cecil Abraham also referred to art 33(1) of the UNCITRAL Arbitration Rules. Article 33(1) reads:

> The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

The paragraph speaks for itself. If the parties do not designate the applicable law, the arbitral tribunal shall apply the law in accordance with the principles of conflict of laws. In the present case, the parties have designated the applicable law in the arbitration clause quoted above and therefore the question of invoking art 33(1) does not arise.

For the reasons stated above, I conclude that the court has no jurisdiction to make an order in respect of any of the prayers in the application. I therefore dismiss the application with costs.

Application dismissed.

Solicitors: *Shearn Delamore*; *Skrine & Co.*

Reported by *Kevin Mathews*